In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-827

THE DETROIT BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF FRED W. RITTER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 15-20) is unofficially reported at 27 A.F.T.R. 2d 71-1838. The opinion of the court of appeals (Pet. App. 21-30) is reported at 467 F.2d 964.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31-32) was entered on September 1, 1972, and after the denial of a petition for rehearing (Pet. App. 33), became final on October 16, 1972. The petition for a writ of certiorari was filed on December 6, 1972. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The decedent, within six months of his death, established a life insurance trust and provided the trustee with funds which the trustee was required to use in the purchase of insurance on the decedent's life for the primary benefit of his children. The funds were concededly transferred in contemplation of death. The question is whether the decedent in substance transferred the policy itself so that the proceeds of the policy, and not merely the sum transferred to purchase it, are includible in his gross estate under Section 2035 of the Internal Revenue Code of 1954 (relating to transactions in contemplation of death).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 2035 of the Internal Revenue Code of 1954 and Sections 20.2035-1 and 20.2042-1 of the Treasury Regulations on Estate Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

The decedent died on October 6, 1964, about six months after creating and funding the life insurance trust here in issue. Under the terms of the trust instrument, the trustee was obligated to purchase an insurance policy upon the life of the decedent with funds to be provided by the decedent. At the time he entered

into this agreement, the decedent transferred $9,600 to the trustee for payment of the first year's premium on a $100,000 ordinary life policy insuring the decedent's life. Upon the decedent's death, the trustee collected the $100,000 face amount payable under the policy. (Pet. App. 15-16, 21-22.)

The decedent's executor did not include the insurance proceeds in his gross estate in the federal estate tax return, but the Commissioner determined that they were includible under Section 2035 of the Code (relating to transactions in contemplation of death). The estate paid the resulting deficiency and then instituted the present refund suit. At trial, the estate conceded for purposes of a motion for partial summary judgment that the decedent had transferred the $9,600 to the trustee in contemplation of death. The district court held that only the $9,600 was includible in the decedent's estate. It reasoned that since the decedent had never possessed the incidents of ownership in the policy, he could not have transferred it in contemplation of death. The court of appeals reversed. The court reasoned that the purpose of Section 2035 is to prevent evasion of the estate tax, and held that the trustee here was the decedent's agent for purchase of the insurance and that the trust device was a substitute for testamentary disposition. Since the decedent had in effect transferred insurance protection, the court held that the date-of-death value of the gift—the matured value of the policy—was includible in his estate. One judge dissented. (Pet. App. 16-20, 22-30.)

ARGUMENT

The decision below is correct. There is neither a

conflict of appellate court decisions nor other warrant for further review.

1. The instant petition presents the issue identical to that presented in the petition for certiorari filed in *Bel* v. *United States* (No. 71-1129, October Term, 1971), certiorari denied, 406 U.S. 919, reported below, 452 F. 2d 683 (C.A. 5).[1] Both this case and *Bel* involve the application of Section 2035 of the Internal Revenue Code of 1954 to a decedent's indirect transfer of an insurance policy on his life. As we pointed out in our opposition in *Bel*, the mere fact that a decedent uses a third party to effect the transfer of an insurance policy does not change the basic nature of his transfer. Both here and in *Bel*, all policy rights and insurance protection derived from the decedent. The decedent executed a trust which compelled the trustee to purchase insurance upon the decedent's life. He then transferred the funds necessary to allow the purchase of insurance and thus to complete the transfer of insurance protection. The court of appeals properly characterized decedent as the real principal in this transfer. (Pet. App. 29.) This characterization was necessary to effectuate the statutory purpose of taking the estate tax profit out of *inter vivos* gifts which are motivated by the same considerations that lead to testamentary dispositions of property. *United States* v. *Wells*, 283 U.S. 102; *Milliken* v. *United States*, 283 U.S. 15.

2. Having correctly determined the nature of the property that the decedent transferred through the

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[1] The same issue is also involved in *First National Bank of Oregon* v. *United States*, 30 A.F.T.R. 2d, par. 147,705 (Ore.), on appeal (C.A. 9), in which the district court held for the Government on the authority of *Bel*.

medium of the insurance trust, the court of appeals proceeded to apply the valuation principles which have long governed inclusions in a decedent's estate under Section 2035. Those valuation principles dictate inclusion of the property transferred at its date-of-death value. Treasury Regulations on Estate Tax (1954 Code), §§ 20.2035-1(e) and 20.2042-1(a)(2), Appendix, *infra*, p. 9. In the case of life insurance, that value is its matured proceed value. *Bel* v. *United States, supra; Sloan's Estate* v. *Commissioner*, 168 F. 2d 470 (C.A. 2); *Slifka* v. *Johnson*, 161 F. 2d 467 (C.A. 2), certiorari denied, 332 U.S. 758; *Thomas* v. *Graham*, 158 F. 2d 561 (C.A. 5); *Vanderlip* v. *Commissioner*, 155 F. 2d 152 (C.A. 2), certiorari denied, 329 U.S. 728; see *Chase Nat. Bank* v. *United States*, 278 U.S. 327, 337.

3. There is no conflict of decisions requiring resolution by this Court. The decision below, contrary to petitioner's assertion (Pet. 5-6), does not conflict with *First National Bank of Midland, Texas* v. *United States*, 423 F. 2d 1286 (C.A. 5). In *Midland*, the insurance policies were issued to the decedent's children well outside the three-year period covered by Section 2035.[2] Consequently, the only asset there diverted within the

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[2] Although the question at issue here was not dealt with in the opinions, the results which the courts reached in *Gorman* v. *United States*, 288 F. Supp. 225 (E.D. Mich.), and *Estate of Chapin* v. *Commissioner*, 29 T.C.M. 11, appear to be in conflict with the decision here. Conflict with these trial court decisions, however, would not provide a basis for review by this Court. Other trial court decisions cited (Pet. 6-7) by the petitioner are inapposite. The court in *Mercantile Trust Company National Ass'n.* v. *United States*, 312 F. Supp. 108 (E.D. Mo.), concluded that the transfers there involved had not been made in contemplation of death.

period covered by Section 2035 was the value of premiums paid by the decedent. See also *Estate of Coleman* v. *Commissioner*, 52 T.C. 921, which is essentially similar to *Midland*. Here on the other hand, there was a transfer of insurance protection which occurred within six months of the decedent's death.

4. Finally, the holding below, contrary to petitioner's assertion (Pet. 11-12), in no way contravenes any Congressional policy expressed in Section 2042 of the Internal Revenue Code of 1954. That section, which governs the includibility of insurance proceeds when the decedent possesses at the date of his death "incidents of ownership" in insurance policies, was not intended to preclude the taxation of insurance proceeds on any other appropriate basis or to restrict the sweep of Section 2035. *Bel* v. *United States, supra;* Treasury Regulations on Estate Tax (1954 Code), § 20.2042-1 (a)(2). Section 2035 applies to transfers of any kind of property in contemplation of death. The decedent here set in motion a chain of events which could only result in his chosen donees receiving $100,000 in life insurance protection. Upon his death, that protection matured and the face amount of the policy became available to or for the benefit of those donees. In these circumstances the decedent's executor can hardly complain if the courts now impose the tax on the basis of the whole chain of events rather than merely one of its links.

Nance v. *United States*, 21 A.F.T.R. 2d 1702 (D. Ariz.), was reversed on appeal, 430 F. 2d 662 (C.A. 9), though on other grounds than those here involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1973.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) [as amended by Sec. 18(a), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960] *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2035-1 *Transactions in contemplation of death.*

* * * * *

(e) *Valuation.* The value of an interest in transferred property includible in a decedent's gross estate under this section is the value of the interest as of the applicable valuation date. In this connection, see sections 2031, 2032, and the regulations thereunder. However, if the transferee has made improvements or additions to the property, any resulting enhancement in the value of the property is not considered in ascertaining the value of the gross estate. Similarly, neither income received subsequent to the transfer nor property purchased with such income is considered.

§ 20.2042-1 *Proceeds of life insurance.*

(a) *In general.* * * *

(2) Proceeds of life insurance which are not includible in the gross estate under section 2042 may, depending upon the facts of the particular case, be includible under some other section of part III of subchapter A of chapter 11. For example, if the decedent possessed incidents of ownership in an insurance policy on his life but gratuitously transferred all rights in the policy in contemplation of death, the proceeds would be includible under section 2035. * * *

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